Supreme Court, U.S.
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NO. 99-1827

IN THE
SUPREME COURT OF THE UNITED STATES

MELANIE STARKMAN,

Petitioner,

v.

THE REV. T. NICHOLS EVANS, a.k.a. NICK EVANS, Individually And In His Official Capacity, Etc. and MUNHOLLAND UNITED METHODIST CHURCH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether summary judgment was properly entered and affirmed on Melanie Starkman's discrimination and retaliation claims, where the undisputed evidence showed that, in her position as Director of Music, she was a spiritual leader of Munholland United Methodist Church and, thus, was barred by the First Amendment of the U.S. Constitution from advancing her claims against the Church and its Senior Pastor.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

I. THE FREE EXERCISE CLAUSE 7

A. The Free Exercise Clause Affords Certain Protections To Churches 7

B. The Free Exercise Clause Extends Beyond Clergy-Members And Ordained Individuals To Cover Other Spiritual Leaders, Too 9

C. The Undisputed Evidence Shows That Starkman Was A Spiritual Leader 10

D. Starkman Cannot Avoid The First Amendment Bar 15

E. Summation Of Free Exercise Clause Argument 20

II. THE ESTABLISHMENT CLAUSE 21

CONCLUSION 23

TABLE OF CITED AUTHORITIES

CASES **Page**

Bell v. Presbyterian Church (U.S.A.),
126 F.3d 328 (4th Cir. 1997) 10, 16

Bollard v. The Calif. Province of the Society of Jesus, 196 F.3d 940 (9th Cir. 1999) 15

Bryant v. Western Elec. Co., Inc.,
572 F.2d 1087 (5th Cir. 1978) 19

Clay v. Equifax, Inc., 762 F.2d 952 (11th Cir. 1985) 19

Davidson & Jones Dev. Co. v. Elmore Dev. Co., Inc.,
921 F.2d 1343 (6th Cir. 1991) 19

Davis v. Cottage Hill Baptist Church,
Civ. A. No. 94-0225-RV-C, 1995 WL 795673
(S.D. Ala. Aug. 29, 1995) 17

DeArment v. Harvey,
932 F.2d 721 (8th Cir. 1991) 17

Dole v. Shenandoah Baptist Church,
899 F.2d 1389 (4th Cir. 1990),
cert. denied, 498 U.S. 846 (1990) 17

EEOC v. Catholic Univ. of Am.,
83 F.3d 455 (D.C. Cir. 1996) 7, 10, 16, 22

EEOC v. Fremont Christian Sch.,
781 F.2d 1362 (9th Cir. 1986) 17

EEOC v. The Roman Catholic Diocese of Raleigh, N.C.,
--- F.3d ---, No. 99-1860, 2000 WL 667370
(4th Cir. May 22, 2000) 9, 12, 13, 14, 15, 16

EEOC v. Southwestern Baptist Theological Seminary,
651 F.2d 277 (5th Cir. 1981), *cert. denied*,
456 U.S. 905 (1982) 10, 16, 17, 22

Everson v. Board of Education,
330 U.S. 1 (1947) 6

Gargano v. Diocese of Rockville Centre,
80 F.3d 87 (2nd Cir. 1996) 17, 23

Glass v. First United Pentecostal Church of DeRidder, 676 So. 2d 724
(La. App. 3rd Cir. 1996) 20

Hayes v. New York City Dep't of Corrections,
84 F.3d 614 (2nd Cir. 1996) 19

Himaka v. Buddhist Churches of Am.,
917 F. Supp. 698 (N.D. Cal. 1995) 22

Joiner v. Weeks, 383 So. 2d 101
(La. App. 3rd Cir.), *writ denied*,
385 So. 2d 257 (La. 1980) 20

Kedroff v. St. Nichols Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94 (1952) 6, 7

Lemon v. Kurtzman, 403 U.S. 602 (1971) 21

McClure v. Salvation Army,
460 F.2d 553 (5th Cir.), *cert. denied*,
409 U.S. 896 (1972) 6, 8, 9, 15

Natal v. Christian and Missionary Alliance,
878 F.2d 1575 (1st Cir. 1989) 7

Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985),
cert. denied, 478 U.S. 1020 (1986) 7, 9, 10, 16, 17, 20, 22

Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360 (8th Cir. 1991) 7, 8, 19, 20, 22

Serbian Eastern Orthodox Diocese for the U.S. v. Milivojevich, 426 U.S. 696 (1976) 8

Simpson v. Wells Lamont Corp.,
494 F.2d 490 (5th Cir. 1974) 9

Volk v. Pribonic,
Civ. A. No. 94-2165, 1996 WL 230103
(W.D. Pa. Jan. 16, 1996) 17

Weissman v. Congregation Shaare Emeth,
38 F.3d 1038 (8th Cir. 1994) 17

Young v. Northern Ill. Conference of United Methodist Church, 21 F.3d 184 (7th Cir.),
cert. denied, 513 U.S. 929 (1994) 9, 20

STATUTES

Americans with Disabilities Act,
42 U.S.C. § 12101 *et seq.* 4, 16

La. R.S. § 23:1361 4

Title VII of the Civil Rights Act of 1964,
42 U.S.C. § 2000e *et seq.*, as amended by the
Civil Rights Act of 1991, 42 U.S.C. § 1981a 8

OTHER AUTHORITIES

B. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*,
79 Colum. L. Rev. 1514 (1979) 10

Louisiana Constitution, Article 1, Section 8 20

U.S. Const. amend. I 6

STATEMENT OF THE CASE

The Petitioner, Melanie Starkman ("Starkman"), was employed from 1992 to 1995 by one of the Respondents, Munholland United Methodist Church ("Munholland Church"), in Metairie, Louisiana. (R-233-34.) She held the positions of Choirmaster and Director of Music. (R-233-34.) Her supervisor was Munholland Church's Senior Pastor, Tommy N. Evans ("Evans"), who is the other Respondent. (R-189.)

In her positions, Starkman had numerous religious duties and responsibilities, as she:

- planned worship liturgy;
- coordinated virtually all Church and worship activities relating to the Church's Music Ministry;
- rehearsed with the choirs (chancel, youth, children's, and bell) and conducted those choirs during worship services;
- hired the Church's organist, youth choir director, youth choir accompanist, and children's choir director; and
- wrote articles about the Church's Music Ministry for the Church's weekly bulletin, *The Munholland Messenger*. Sometimes, her articles introduced liturgical seasons for worship services.

(R-185-91.)

Starkman, in her own words, also had "unstated spiritual [and] ministerial" duties, as Church-members viewed her as a spiritual leader of the congregation. (R-185, 189-91.) Once, she was specifically designated as a "Ministerial Presence" for a visit to a hospitalized Church-member. (R-186.)

During her employment, Starkman drafted a document entitled "1994 MINISTRY OF EXCELLENCE TO MUSIC," in which she stated the purpose of the Church's Music Ministry:

> The *Music Ministry* of Munholland United Methodist Church sees music as a gift from God. *Making and listening to music can be, therefore, an act of prayer, an expression of faith, and a form of spiritual discipline that makes us aware of our relationship to God and to each other.* Within our diversity, then, the *Music Ministry* seeks to offer different ways to express these gifts and reach out and share them with the Christian Community at large.

(R-192 (emphasis added).)

The importance of music to the United Methodist worship is also explained in *The United Methodist Hymnal*, which states that hymns, anthems, and other musical responses are as an integral part of the worship service as prayers, preaching, and Scripture readings. (R-193-96.)

After being hired by Munholland Church for the position of Choirmaster, Starkman received certification from the United Methodist Church as a Director of Music Ministry. (R-191.) As a result, Munholland Church promoted her from Choirmaster to Director of Music. (R-191.)

In order to be certified as a Director of Music Ministry, an individual must meet these standards:

- "A master's degree with a major in music. Graduate courses should include Church Music in Theory and Practice, Choral Conducting, Worship, Choral Vocal Methods, Hymnology, Bible, Theology, Christian Education, and United Methodist History, Doctrine, and Polity."

- "Effective supervised experience for at least two (2) years of employment with full responsibility in music ministry in The United Methodist Church after completion of academic requirements."

- "An expressed commitment to continuing education that includes a planned program that enriches both personal and professional growth. Such a program shall include: 1) reading; 2) study -- individual and group learning events; 3) participation in professional, community, denominational, and ecumenical groups; 4) renewal of spiritual life; and 5) evaluation by the immediate supervisor."

(R-197.)

The job description for Director of Music, which Starkman signed, states that "[t]he Director of Music is responsible for the planning, recruiting, implementing and evaluating of music and congregation participation in all aspects of this ministry at

Munholland United Methodist Church." (R-198.) The job description also states that the Director of Music is to "[w]ork closely with [the] music and[/]or worship committee to plan the overall music program of the church . . . ." (R-198.)

After her employment was terminated by Munholland Church, Starkman filed this lawsuit on January 27, 1997, alleging claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and a Louisiana retaliatory discharge statute, La. R.S. § 23:1361. (R-231, 234, 236.) Munholland Church and Evans filed a motion for summary judgment on December 30, 1997. (R-152.) The district court granted that motion on August 26, 1998, and dismissed Starkman's claims with prejudice. (Starkman's Petition, Appendix C at 12a-24a.) Consequently, on August 31, 1998, the district court entered judgment in favor of Munholland Church and Evans. (Starkman's Petition, Appendix D at 25a.)

Starkman moved for reconsideration of the district court's entry of summary judgment, but that court denied her motion on October 1, 1998. (Starkman's Petition, Appendix B at 10a-11a.) Starkman then filed a notice of appeal to the U.S. Court of Appeals for the Fifth Circuit on October 20, 1998. (R-441.)

The Fifth Circuit affirmed the district court's decision on December 27, 1999. (Starkman's Petition, Appendix A at 1a-9a.) Starkman filed petitions for rehearing and for rehearing en banc, but the Fifth Circuit denied those petitions on February 14, 2000. (Starkman's Petition, Appendix E at 26a-27a.)

SUMMARY OF THE ARGUMENT

The First Amendment of the U.S. Constitution bars courts from reviewing the employment relationship between a church and one of its spiritual leaders. Here, Starkman was the Director of Music for Munholland Church. The undisputed evidence -- including the job description for that position and the importance of music to the Methodist faith, along with Starkman's own answers to interrogatories, in which she listed the numerous religious duties which she performed -- shows that Starkman was a spiritual leader of Munholland Church. Therefore, the district and appellate courts correctly concluded that the First Amendment prohibits Starkman from advancing her claims.

There is *no* conflict among the circuit courts of appeal on the question presented in this case. Both the Fourth and Fifth Circuits have ruled that directors of music are spiritual or religious leaders who, even if not ordained, are barred by the First Amendment from advancing these kinds of suits. A recent Ninth Circuit case does *not* conflict with the Fourth and Fifth Circuit's decisions but, instead, merely recognizes that the First Amendment bar does not apply where the plaintiff was *sexually harassed*. That is not the issue here.

If Starkman's petition were granted, this Court simply would be reviewing undisputed factual evidence and applying non-conflicting case law -- just as the district court and Fifth Circuit already have done. There is no need to examine Starkman's re-hashed contentions any further.

ARGUMENT

The First Amendment prohibits courts from reviewing matters of church administration, such as a church's employment relationship with one of its spiritual leaders. Here, the evidence shows that Starkman had *numerous religious duties* and was a *spiritual leader* in her position as head of Munholland Church's Music Ministry. Thus, the First Amendment bars any court review of her claims.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. As this Court and the Fifth Circuit have pronounced, that language mandates a "wall of separation" between church and government:

> Though that "wall of separation" between permissible and impermissible intrusion of the State into matters of religion may blur, or become indistinct, or vary, *it does and must remain high and impregnable*. In *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947), it was said, "*We could not approve the slightest breach*."

McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972) (emphasis added).

This wall has produced a "common thread" which runs through this Court's decisions: "For throughout these opinions there exists 'a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, *power to decide for themselves, free from state interference, matters of church government* . . . .'" *Id.* at 560 (quoting *Kedroff v. St.*

Nichols Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952)) (emphasis added). Thus, "courts cannot adjudicate disputes turning on church policy and administration . . . ." *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1576 (1st Cir. 1989) (citations omitted).

Here, the district court and Fifth Circuit correctly recognized that Starkman's lawsuit violates the First Amendment because it would require an examination of her employment relationship with Munholland Church. That examination would *unduly burden the Church's free exercise of religion* in violation of the First Amendment's Free Exercise Clause.[1]

I. THE FREE EXERCISE CLAUSE

A. The Free Exercise Clause Affords Certain Protections To Churches

This Clause bars courts from reviewing personnel decisions of religious leaders because it "guarantees a church's freedom to decide how it will govern itself . . . and to whom it will entrust its ministerial responsibilities . . . ." *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996). Thus, the Clause prevents statutes like the ADA from encroaching on the ability of a church to manage its internal affairs. *Id.* at 460 (citing *Kedroff*, 344 U.S. at 116). As the Eighth Circuit has stated, "Personnel decisions by church-affiliated institutions affecting clergy are *per*

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[1] It is not unusual for a plaintiff's discrimination or retaliation suit to violate the First Amendment's Establishment Clause, too. *See, e.g., Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168-70 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). A few of the cases discussed in this Brief seem to blur the distinction between the two Clauses.

se religious matters and cannot be reviewed by civil courts . . . ." *Scharon*, 929 F.2d at 363.

The Eighth Circuit's pronouncement is fully supported by abundant case law, including Fifth Circuit precedent upon which the district and appellate courts properly relied. In *McClure*, a minister sued The Salvation Army, which is a church, under Title VII[2] after she was discharged by the church. *McClure*, 460 F.2d at 554. At issue was "whether Title VII . . . applies to the employment relationship between a church and its ministers and, if applicable, whether the statute impinges upon the Religion Clauses of the First Amendment." *Id.* at 554-55. The Fifth Circuit ruled that the First Amendment barred the plaintiff from advancing her suit because Title VII's application to the employment relationship between the plaintiff and her church "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment." *Id.* at 560. The Fifth Circuit also succinctly stated the heart of the issue by noting that the "relationship between an organized church and its ministers is its lifeblood." *Id.* at 558.

The *McClure* case is in lock step with decisions of this Court which dictate that the composition of a church's hierarchy is to be left for the church's sole resolution. *See, e.g., Serbian Eastern Orthodox Diocese for the U.S. v. Milivojevich*, 426 U.S. 696 (1976). As courts have recognized, "*Milivojevich*, read in its entirety, holds that civil court review of ecclesiastical decisions of

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[2] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a. Like the ADA and the Louisiana retaliatory discharge statute at issue in this case, Title VII is an anti-discrimination and anti-retaliation statute. (Starkman's Petition, Appendix A at 4a-5a.)

church tribunals, particularly those pertaining to the hiring or firing of clergy, are *in themselves* an 'extensive inquiry' into religious law and practice, and hence forbidden by the First Amendment." *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir.), *cert. denied*, 513 U.S. 929 (1994).[3]

B. The Free Exercise Clause Extends Beyond Clergy-Members And Ordained Individuals To Cover Other Spiritual Leaders, Too

The First Amendment bar also applies to "non-clergy" and "non-ordained" individuals. In *Rayburn*, the plaintiff alleged that she was the victim of sex discrimination when her application for a position as an "associate in pastoral care" was rejected. *Rayburn*, 772 F.2d at 1165. The Fourth Circuit noted that, *even though the plaintiff was not seeking a position as an ordained minister*, the First Amendment bar, which applied to a minister in *McClure*, *"does not depend upon ordination but upon the function of the position."* *Id.* at 1168 (emphasis added). Determining that the position at issue was "important to the spiritual and pastoral mission of the church," the *Rayburn* court articulated this rule: *"[I]f the employee's primary duties consist of teaching, spreading the faith, church governance, supervision*

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[3] *See also Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974) ("[C]ivil courts are barred by the First Amendment from determining ecclesiastical questions.") (citations omitted); *Rayburn*, 772 F.2d at 1168 ("Any attempt by government to restrict a church's free choice of its leaders thus constitutes a burden on the church's free exercise rights."). As the Fourth Circuit explained in *Rayburn*, it is not the church's reason(s) for the personnel decision but, more generally, the church's decision itself that the First Amendment protects. *Id.* at 1169 ("[T]he free exercise clause . . . protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content."). *See also EEOC v. The Roman Catholic Diocese of Raleigh, N.C.*, --- F.3d ---, No. 99-1860, 2000 WL 667370, at *5 (4th Cir. May 22, 2000).

of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.'" Id. at 1169 (quoting B. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 Colum. L. Rev. 1514, 1545 (1979)) (emphasis added).[4] Thus, someone who may not be a "clergy-member" in the eyes of his or her church may still be a "clergy-member" -- or, better put, a "spiritual leader" -- in the eyes of the First Amendment.

C. The Undisputed Evidence Shows That Starkman Was A Spiritual Leader

Although Starkman contends that the First Amendment bar does not apply because she was not a spiritual leader, the undisputed facts show otherwise. In response to a discovery request asking her to identify "any religious or worship-oriented job duties, responsibilities, or functions while [she was] employed as the Director of Music . . . ," Starkman listed 21 religious duties. (R-185-87.) Among the religious duties which she attributed to herself were:

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[4] *See also Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 332 (4th Cir. 1997) (following *Rayburn* and listing cases where the First Amendment bar prevented non-ordained individuals from advancing employment-related lawsuits); *Catholic Univ. of Am.*, 83 F.3d at 463 ("[T]he ministerial exception encompasses all employees of a religious institution, *whether ordained or not*, whose primary functions serve its spiritual and pastoral mission.") (citing *Rayburn*, 772 F.2d at 1169) (emphasis added); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283-84 (5th Cir. 1981) (holding that the First Amendment bars the application of Title VII to *faculty* at a seminary), *cert. denied*, 456 U.S. 905 (1982).

- planning worship liturgy;
- coordinating virtually all Church and worship activities relating to the Church's Music Ministry;
- rehearsing with the choirs (chancel, youth, children's, and bell) and conducting those choirs during worship services;
- hiring the Church's organist, youth choir director, youth choir accompanist, and children's choir director; and
- writing articles about the Church's Music Ministry for the Church's weekly bulletin, *The Munholland Messenger*. Sometimes, her articles introduced liturgical seasons for worship services.

(R-185-87.)

Additionally, Starkman responded to this same interrogatory by explaining that she had "unstated spiritual [and] ministerial" duties. (R-185.) Starkman's own recognition of her importance as a spiritual leader, who was integral to the religious mission, function, and operation of Munholland Church, is by itself sufficient evidence to trigger the First Amendment bar to her claims.

That conclusion is buttressed by the undisputed evidence which highlights the importance of music in the Methodist faith. For example, a document which Starkman herself drafted states that "[m]aking and listening to music can be . . . an act of prayer,

an expression of faith, and a form of spiritual discipline that makes us aware of our relationship to God and to each other." (R-192.) Also, *The United Methodist Hymnal* states that hymns, anthems, and other musical responses *are as an integral part of the worship service as prayers, preaching, and Scripture readings.*[5] (R-193-96.)

Interestingly, in a separate interrogatory that *immediately followed* the one asking Starkman to list her "religious or worship-oriented job duties," Munholland Church and Evans asked Starkman to list her "nonreligious, nonworship-oriented, or secular job duties." In response to this latter interrogatory -- and in contrast to the 21 religious duties that she previously had detailed -- Starkman listed only *three* non-religious duties. (R-187-88.) As the district and appellate courts implicitly found, there is no way that Starkman or her counsel could have misunderstood those back-to-back interrogatories. Her answers to those interrogatories are compelling admissions that she was a spiritual leader.

A very recent and very similar Fourth Circuit case is instructive. In *Roman Catholic Diocese*, the plaintiff, a lay Director of Music Ministry, sued the local Roman Catholic Diocese for sex discrimination. *Roman Catholic Diocese*, 2000 WL 667370, at *1. The district court dismissed the action as barred by the First Amendment under the ministerial exception. *Id.* On finding that the Music Director's "primary duties at the Cathedral . . . consisted of the selection, presentation, and teaching of music, which is integral to the spiritual and pastoral mission of the Catholic Church and many other religious traditions," the Fourth Circuit affirmed. *Id.*

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[5] Additional evidence, such as the standards for a Director of Music Ministry, supports the conclusion that Starkman was a religious leader. (R-189-99.)

Like Starkman here, the EEOC contended that the Music Director's position was not essentially religious in nature but, rather, was primarily secular. *Id. at* *5. The Fourth Circuit disagreed:

> The music ministry and teaching positions at issue are ministerial because the positions are "important to the spiritual and pastoral mission" of the church. . . . The functions of the positions are bound up in the selection, presentation, and teaching of music, which is an integral part of Catholic worship and belief. The Free Exercise Clause therefore bars consideration of the instant employment discrimination claims. To hold otherwise would require us to say that music is substantially devoid of spiritual significance in the life of the church. Such a view cannot stand in light of the role of religious music in worship and the record in this case.
>
> At the heart of this case is the undeniable fact that music is a vital means of expressing and celebrating those beliefs which a religious community holds most sacred. Music is an integral part of many different religious traditions. . . . It serves a unique function in worship by virtue of its capacity to uplift the spirit and manifest the relationship between the individual or congregation and the Almighty. Indeed, the church has presented ample undisputed evidence affirming the centrality of sacred music to the Catholic faith and the importance of music ministry to the faith community. . . .

> Thus, inasmuch as [the Music Director's] duties involve the expression of the church's musical tradition, it is a fallacy to denominate them as merely secular. . . . The efforts of a music minister or teacher can . . . influence the spiritual and pastoral mission of the church as much as one who would lead the congregation in prayer, preach from the pulpit, or teach theology in school.
>
> [The Music Director] was clearly a pivotal figure in most, if not all, aspects of the musical life of the Cathedral . . . . The various job descriptions for the music ministry positions, though not dispositive, unmistakably evince the religious significance of her music ministry. [The Music Director] was required to assist in the planning of liturgies and was in charge of the parish choirs -- functions at the very heart of the church's musical life. The positions also entailed responsibility for recruiting choir members, cantors, and special musicians. . . . The [job] description also conferred upon the Director of Music Ministries responsibility "for all music associated with worship" and detailed a number of duties relating to the selection and presentation of liturgical music.

Id. at *6 (citations omitted).

The Fourth Circuit concluded that the Director of Music "played a prominent role in worship services" and "was the primary human vessel through whom the church chose to spread its message in song." *Id.* at *7-8. As the facts in that case are

strikingly similar to the facts here,[6] there is no conflict between the circuits. To the contrary, two circuit courts of appeal have ruled that directors of music are covered by the First Amendment's ministerial exception. No circuit court has held otherwise.

D. Starkman Cannot Avoid The First Amendment Bar

Trying to convince this Court to take this case, Starkman cites a Ninth Circuit case and argues that it creates a conflict among the circuits. *See Bollard v. The Calif. Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999). That case, however, involved a novice who was allegedly *sexually harassed* while training to become a priest. *Id.* at 944. Comparing that case to the Fifth Circuit's *McClure* case, the Ninth Circuit noted: "[T]his is not a case about the Jesuit order's choice of representative, a decision to which we would simply defer without further inquiry. [The plaintiff] does not complain that the Jesuits refused to ordain him or engaged in any other adverse personnel action." *Id.* at 947. Thus, the Ninth Circuit had no occasion to apply the ministerial exception, so *Bollard* does *not* apply here, and there is *no* conflict between the circuits.

In her Petition, Starkman also reiterates six contentions that the Fifth Circuit already rejected. First, she harps on the facts that she was not ordained and was not a clergy-member in the eyes of the United Methodist Church. (Starkman's Petition at 18-23.) But neither Munholland Church nor Evans have disputed that fact. What Starkman is forgetting here is that the First Amendment prevents her from advancing her claims because the undisputed evidence shows that she was a *spiritual leader*. There is *no* requirement under the law that, in order for the First Amendment

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[6] *See also id.* at *1-2, 7-8.

bar to apply, a plaintiff must have been a clergy-member or an ordained individual. *See, e.g., Roman Catholic Diocese, supra; Bell, supra; Catholic Univ. of Am., supra; Rayburn, supra; Southwestern Baptist Theological Seminary, supra.* Thus, the district court correctly stated -- and the Fifth Circuit agreed -- that "[a]n individual's designation by an organization [*i.e.*, a church] is neither necessary nor sufficient to control the designee's 'extra religious legal status.'" (Starkman's Petition, Appendix C at 19a and Appendix A at 5a-6a.)

Second, Starkman asserts that she "never led the congregation in singing." (Starkman's Petition at 21.) Munholland Church and Evans submit that the district court correctly stated that Starkman, "as the Director of Music, was a very visible presence in leading the congregation during Sunday worship service . . . ." (Starkman's Petition, Appendix C at 21a.) Indeed, Starkman *was* very visible during the Sunday services and other seasonal services (*e.g.*, Christmas and Easter), conducting and directing the choirs -- chancel, youth, children's, and bell. As the choir leads the congregation in singing and as Starkman led the choir, there can be no genuine dispute that Starkman *led* religious ritual and worship on Sundays, especially in light of the evidence showing the importance of music in the Methodist faith. (R-189-99.)

Third, Starkman points out that the United Methodist Church seeks to comply with the ADA. (Starkman's Petition at 12-14.) However, just because a religious body articulates its intention to comply with the ADA does not mean that it is waiving its First Amendment protection in the event that it is sued under that statute by a current or former spiritual leader. While the ADA *generally* applies to religious institutions (*e.g.*, a church secretary or janitor may advance an ADA claim if he or she is discharged because of a disability), the First Amendment bar sometimes is

triggered, as it is in this case. This Brief is replete with cases discussing that bar as it applies to discrimination suits brought by clergy-members and spiritual leaders. Although Starkman cites some cases in her Petition, those cases are *not* persuasive authority in her favor for three reasons. First, some of those cases did not involve churches but, rather, entities which were affiliated with -- but attenuated from -- churches (*e.g.*, schools); thus, the highest level of First Amendment protection was *not* triggered in those cases, as it is here. *See Southwestern Baptist Theological Seminary*, 651 F.2d at 281. Second, some of those cases are distinguished because the plaintiffs in those cases -- unlike Starkman here -- did not participate in religious rituals and did not have numerous religious duties; thus, those plaintiffs were neither clergy-members nor spiritual leaders.[7] Third, some of those cases dealt with contract or pay issues -- matters which involve less interference with a church's affairs than an examination of the reasons for a spiritual leader's discharge.[8]

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[7] *See Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038, 1040 (8th Cir. 1994) (where the plaintiff was a temple administrator who "was responsible for logistical support of activities including supervision of administrative, clerical, building maintenance, and custodial personnel); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1369-70 (9th Cir. 1986) (teachers); *Volk v. Pribonic*, Civ. A. No. 94-2165, 1996 WL 230103 (W.D. Pa. Jan. 16, 1996) (maintenance supervisor); *Davis v. Cottage Hill Baptist Church*, Civ. A. No. 94-0225-RV-C, 1995 WL 795673 (S.D. Ala. Aug. 29, 1995) (janitor).

[8] *See DeArment v. Harvey*, 932 F.2d 721, 721-22 (8th Cir. 1991) (following *Dole*, *infra*); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396 & n.13 (4th Cir. 1990) (highlighting the fact that a pay issue was involved and distinguishing the *teachers* at issue from the plaintiffs in the *Rayburn* and *Southwestern Baptist Theological Seminary* cases), *cert. denied*, 498 U.S. 846 (1990). *But see Gargano v. Diocese of Rockville Centre*, 80 F.3d 87, 90 (2nd Cir. 1996) (involving a *faculty-member*).

Fourth, Starkman asserts a public policy argument involving federal tax law. (Starkman's Petition at 23.) This argument -- which she did not raise to the district court until *after* it had granted summary judgment -- was belatedly asserted and should be disregarded. (R-452-54.) Moreover, it is irrelevant because it is not the First Amendment's assignment to coincide with federal tax law.

Fifth, Starkman notes that she failed to verify her answers to the interrogatories at issue (where she listed all of her religious-oriented job duties). (Starkman's Petition at 24.) That failure means nothing, though, as she obviously provided the answers to her attorney -- answers which are replete with religious-oriented duties. She should not prevail now simply because she previously failed to comply with federal rules requiring her answers to be sworn.

Sixth, Starkman contends that her objection to the interrogatories (on the ground of vagueness) saves her. (Starkman's Petition at 25-27.) That contention is futile, however, because the duties that Starkman listed speak for themselves. It does not matter whether she mistakenly categorized some non-religious duties as "religious or worship-oriented job duties." What matters is that her list is laced with duties which she actually performed -- duties which are indicative of a spiritual leader. For example, *Starkman indisputably conducted and directed the choirs during the Sunday Church services, planned worship liturgy, visited sick choir-members, recruited choir-members, hired the Church organist and youth choir leaders, introduced liturgical seasons for worship services, and "carr[ied] out" seasonal obligations such as All Saints' Day, Advent, Christmas, Lent, Holy Week and Easter*. (R-185-87.) All of this undisputed evidence proves that Starkman was a leader -- a *spiritual* leader -- of the Church. There is nothing vague about her answers to the

interrogatories, and there is nothing vague about the interrogatories themselves. Even if she, based on her vagueness objection, were allowed to switch some of her duties from one "column" to the other so as to list more non-religious duties and fewer religious duties, such a maneuver would not operate to diminish her spiritual and leadership role as the former Director of Music. *See Scharon*, 929 F.2d at 362 ("It is without consequence that she also may have performed many secular duties. She was not a secular employee who happened to perform some religious duties; she was a spiritual employee who also performed some secular duties.").[9]

Although Starkman longs for her "day in court," and the granting of summary judgment ostensibly has deprived her of that opportunity, it is submitted that Starkman does not "long" with clean hands. This Court should be aware that the district court gave Starkman several months to present her grievances to an arbitrator, but that she failed to take advantage of that opportunity.[10]

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[9] This Court should not accept Starkman's attempt to change the substance of her answers to the interrogatories by introducing subsequent declarations. (R-95-107.) Faced with similar circumstances, courts have recognized that parties cannot avoid summary judgment by submitting affidavits which contradict their prior sworn deposition testimony. *Bryant v. Western Elec. Co., Inc.*, 572 F.2d 1087, 1088 (5th Cir. 1978); *Hayes v. New York City Dep't of Corrections*, 84 F.3d 614, 619 (2nd Cir. 1996); *Davidson & Jones Dev. Co. v. Elmore Dev. Co., Inc.*, 921 F.2d 1343, 1352 (6th Cir. 1991); *Clay v. Equifax, Inc.*, 762 F.2d 952, 955 n.3 (11th Cir. 1985).

[10] After the parties had agreed in March, 1998, to non-binding arbitration, Starkman never scheduled a hearing date over the course of *five months*. Starkman has attempted to blame the failure to go to arbitration on Munholland Church and Evans. However, it was Munholland Church and Evans who attempted in May, 1998, to schedule a hearing date. After receiving no response from Starkman, they actually scheduled a hearing, which Starkman then

E. Summation Of Free Exercise Clause Argument

Starkman's contentions have been rejected twice before and should be rejected again. The undisputed evidence shows that she was a spiritual leader of the Church. Therefore, the district and appellate courts properly concluded that the Free Exercise Clause prohibited her from advancing her claims.[11]

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canceled. Later, the parties had some discovery disputes, one of which centered on whether a "911" telephone call from Evans' home years ago had anything at all to do with this litigation. A magistrate judge handled those matters. If this Court chooses to review the record, it will find that Munholland Church and Evans received favorable rulings from the magistrate judge and, therefore, obviously had good reasons for seeking to block or limit discovery in certain irrelevant areas. (R-14, 374-75.)

[11] The Louisiana Constitution also prohibits this type of a suit against a religious entity. *Glass v. First United Pentecostal Church of DeRidder*, 676 So. 2d 724 (La. App. 3rd Cir. 1996) ("The First Amendment of the *United States Constitution* and Article 1, Section 8 of the *Louisiana Constitution* both guarantee religious freedom and have been interpreted to forbid courts from interfering in the ecclesiastical matters of religious groups . . . . This prohibition extends to matters of religious discipline, faith, or custom, *as well as to the appointment and removal of ministers*.") (citing *Joiner v. Weeks*, 383 So. 2d 101 (La. App. 3rd Cir.), *writ denied*, 385 So. 2d 257 (La. 1980)) (other citations omitted) (last emphasis added).

Just as the U.S. and Louisiana Constitutions bar Starkman's claims against Munholland Church, they also bar her claims against Evans. The entire purpose of the Constitutional protections would be defeated if a church were shielded from suits by a former spiritual leader but the church's decision-makers were not similarly protected. The First Amendment does not merely protect the cathedral, chapel, or structure which is the church; instead, it also shields the decision-makers who carry out employment decisions affecting clergy-members or spiritual leaders. Thus, courts have dismissed individual defendants on First Amendment grounds. *See, e.g., Young, supra*; *Scharon, supra*; *Rayburn, supra*; *Glass, supra*; *Joiner*, 383 So. 2d at 106 ("To allow defamation suits to be litigated to the fullest extent against members of a religious board who are merely discharging the duty which has been entrusted to them by their church could have a potentially chilling effect on the performance of those duties . . . .").

II. THE ESTABLISHMENT CLAUSE

Starkman's claims also are barred by the Establishment Clause of the First Amendment.[12] For a statute at issue to withstand scrutiny under this Clause:

> (1) it must have a secular legislative purpose;
>
> (2) its principal or primary effect must be one that neither advances nor inhibits religion; *and*
>
> (3) it must not foster an excessive governmental entanglement with religion.

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

Here, Munholland Church and Evans do not contest the first two parts of the *Lemon* test. Thus, this Constitutional issue turns on the third part: whether the application of the ADA and the Louisiana retaliatory discharge statute to the particular facts of this case results in excessive governmental entanglement with religion. To determine whether any entanglement is excessive, courts examine (i) the character of the institution affected, (ii) the nature of the burden provided, and (iii) the resulting relationship between the church and state. *Id.* at 614-15.

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[12] Munholland Church and Evans made this argument to the district and appellate courts. Although neither of those courts found a violation of the Establishment Clause (Starkman's Petition, Appendix A at 3a n.1 and Appendix C at 16a-18a), Munholland Church and Evans are submitting their arguments on this issue out of an abundance of caution, so that they are not deemed to have waived them.

With regard to the first factor, Munholland Church is an *entirely religious* entity. It is not merely a school or some other organization (*e.g.*, a day-care center) which is affiliated with -- but attenuated from -- a church; instead, it is the Church itself. This fact triggers the First Amendment's highest level of protection. *Southwestern Baptist Theological Seminary*, 651 F.2d at 281.

As for "the nature of the burden provided," the statutes at issue have caused -- and are continuing to cause -- a real and substantial burden on Munholland Church and Evans. Both parties already have engaged in a time-consuming defense of Starkman's claims, including written discovery, depositions, and appeals. This fact alone demonstrates a substantial burden. *Rayburn*, 772 F.2d at 1171.

Finally, concerning the resulting relationship between Munholland Church and the State, the government would be excessively involved in a matter of Church administration if Starkman were to advance this suit. This case is about the employment relationship between a Church and one of its spiritual leaders. If this Court were to review and make findings on the facts of this case, then the state would be trampling the Church's Constitutional right to make its own decisions regarding its employment of religious leaders. *Rayburn*, 772 F.2d at 1169 ("[I]ntroduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state."). Accordingly, the Establishment Clause prohibits Starkman from advancing her claims. *See Catholic Univ. of Am.*, 83 F.3d at 465-67; *Scharon*, 929 F.2d at 362-63; *Rayburn*, 772 F.2d at 1169-71; *cf. also Himaka v. Buddhist Churches of Am.*, 917 F. Supp. 698, 709 (N.D. Cal. 1995) (ruling that a church's financial decisions -- even though not a part of the church's spiritual function -- are vital to

ministerial and religious planning and, thus, are not subject to court review). *But see Gargano*, 80 F.3d at 90.

CONCLUSION

Starkman's petition for a writ of certiorari should be denied because the undisputed evidence shows that she was a spiritual leader of Munholland Church and the non-conflicting case law provides that the First Amendment bars a court from reviewing the employment relationship between a church and one of its spiritual leaders.

Respectfully submitted, this 14th day of June, 2000.

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